Booi Kim Lee v Menteri Sumber Manusia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION SUIT NO R1-25-160-1996
KC VOHRAH J
17 MARCH 1999

Labour Law *— Industrial Court — Discretion of Minister — Refusal to refer representation to Industrial Court — No reason given — Whether representation was frivolous and vexatious —Whether refusal by Minister not to refer representation can be interfered by High Court*

The applicant was the chief security officer of the respondent company. The applicant was involved in a fight with a former employee of the company. A domestic enquiry was conducted and the applicant was dismissed. The applicant made a representation to the Director General and a conciliation proceeding was conducted. The matter was then notified to the Minister. The Minister in exercise of his discretion under s 20(3) of the Industrial Relations Act 1967 ('the Act') declined to refer the representation to the Industrial Court. The applicant made an application for an order of certiorari to quash the decision of the Minister and for an order of mandamus to require the Minister to refer the dismissal to the Industrial Court on the grounds that: (i) the Minister had exceeded his jurisdiction and had acted ultra vires the Act. It was contended that in not referring the representation to the Industrial Court, the Minister had not taken into consideration that the representation was not frivolous and vexatious; (ii) the Minister had failed to ask the right question; and (iii) no reasons were given for the decision to refer the matter to the Industrial Court.

Held, dismissing the application:

(1) The refusal by the Minister to refer the representation to the Industrial Court cannot be interfered by the High Court if the representations are clearly trivial, frivolous or vexatious. If the representations are not clearly trivial, frivolous or vexatious, the High Court has to examine whether the Minister has exercised his discretion with improper motive, or that he misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or given a decision that militates against the object of the statute. The examination of the facts of the present case showed that the representation was not trivial, frivolous or vexatious. However, it had not been shown that the facts point to the Minister acting outside the provision of the Act and that they raised serious questions of facts or law. The dispute of facts was not on fundamental issues and, in any event, there was no legal requirement that merely because representation was made, it must automatically be referred to the Industrial Court. The Minister did not exercise his discretion with improper

motive. Further, it had not been shown what right questions were not asked (see pp 526B–C, 527B–C). A

(2) There is no duty expressed under the Act or the rules made thereunder for the Minister to provide reasons for the course of action that he took. Further, the absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. In the present case, taking all the facts and circumstances as were disclosed to the Minister, it had not been shown that the known facts and circumstances appeared to point overwhelmingly in favour of a different decision. The view was that the fighting incident brought to the surface the applicant's poor management and abuse of power and showed that he was by nature an aggressive, arrogant, impatient and rude person. The issue of instigation or provocation was irrelevant in the context of his being a chief security officer. Any reasonable person relying on facts and circumstances to dismiss an employee cannot be considered as taking a perverse view (see pp 527E–I, 528B–C). B C D

[Bahasa Malaysia summary

Pemohon adalah seorang ketua pegawai kawalan di syarikat responden. Pemohon telah terlibat di dalam satu pergaduhan dengan seorang bekas pekerja syarikat tersebut. Satu penyiasatan domestik telah dijalankan dan pemohon telah dibuang kerja. Pemohon telah membuat satu representasi kepada Ketua Pengarah dan suatu prosiding pendamaian telah dijalankan. Perkara ini telah di-kemukakan kepada Menteri. Menteri di dalam melaksanakan budi bicara beliau di bawah s 20(3) Akta Perhubungan Perusahaan 1967 ('Akta tersebut') menolak untuk merujuk representasi tersebut kepada Mahkamah Perusahaan. Pemohon membuat suatu permohonan perintah certiorari untuk membatalkan keputusan Menteri dan perintah mandumus yang menghendaki Menteri merujuk pemecatan tersebut ke Mahkamah Perusahaan atas alasan-alasan bahawa: (i) Menteri telah melebihi budi bicara beliau dan telah bertindak ultra vires dengan Akta tersebut. Ditegaskan bahawa dalam tidak merujukkan representasi tersebut ke Mahkamah Perusahaan, Menteri telah tidak mengambil kira bahawa representasi tersebut adalah tidak remeh dan menyusahkan; (ii) Menteri telah gagal untuk menanyakan soalan yang betul; dan (iii) tidak ada sebab diberi ke atas keputusan untuk merujuk perkara tersebut ke Mahkamah Perusahaan. E F G H

Diputuskan, menolak permohonan tersebut:

(1) Keengganan Menteri untuk merujuk representasi-representasi tersebut ke Mahkamah Perusahaan tidak boleh dicampurtangan oleh Mahkamah Tinggi jika representasi-representasi tersebut adalah dengan jelas perkara yang kecil, remeh dan menyusahkan. Sekiranya representasi-representasi tersebut jelas tidak kecil, I

remeh dan menyusahkan, Mahkamah Tinggi harus meneliti sama ada Menteri telah melaksanakan budi bicara beliau dengan tujuan yang salah, atau beliau telah tersalaharah dalam undang-undang atau telah mengambil kira perkara-perkara yang tidak perlu atau tidak mengambil kira perkara-perkara yang perlu atau memberi keputusan yang menghalang tujuan statut tersebut. Pemeriksaan fakta kes sekarang ini menunjukkan bahawa representasi tersebut tidak kecil, remeh atau menyusahkan. Walau bagaimanapun, tidak ditunjukkan bahawa fakta-fakta tersebut menuju kepada Menteri yang beliau bertindak di luar peruntukan Akta tersebut dan persoalan-persoalan penting mengenai fakta-fakta atau undang-undang telah dikemukakan. Pertikaian fakta-fakta bukan pada isu-isu asasi dan di dalam apa keadaan tidak mempunyai keperluan menurut undang-undang di mana hanya kerana representasi tersebut telah dibuat, maka ia perlu di rujuk secara automatik ke Mahkamah Perusahaan. Menteri tidak melaksanakan budi bicara beliau dengan tujuan yang salah. Selanjutnya, tidak ditunjukkan apakah soalan-soalan betul yang tidak ditanyakan (lihat ms 526B–C, 527B–C).

(2) Tidak ada kewajipan yang dijelaskan di bawah Akta tersebut atau kaedah-kaedah yang wujud di dalamnya bahawa Menteri hendaklah memberi sebab-sebab terhadap perjalanan tindakan yang beliau ambil. Selanjutnya, ketiadaan sebab-sebab suatu keputusan dibuat di mana tidak ada kewajipan untuk memberi mereka sebab-sebab tersebut tidak boleh dengan sendirinya memperuntukkan apa-apa sokongan kepada keputusan yang dicadangkan secara tidak rasional. Di dalam kes ini, dengan mengambil semua fakta-fakta dan keadaan-keadaan sebagaimana yang didedahkan kepada Menteri, adalah tidak ditunjukkan bahawa fakta-fakta dan keadaan-keadaan tersebut dengan jelas memihak kepada suatu keputusan yang berlainan. Pendekatan adalah bahawa kejadian pergaduhan tersebut telah menonjolkan pengendalian yang lemah pemohon dan penyalahgunaan kuasa dan menunjukkan bahawa beliau secara semulajadi adalah seorang yang agresif, sombong, tidak sabar dan kurang ajar. Isu desakan atau bangkitan marah tidak penting di dalam konteks di mana beliau adalah seorang ketua pegawai kawalan. Seorang yang waras yang bergantung kepada fakta-fakta dan keadaan-keadaan tersebut yang digunakan untuk memecat seorang pekerja tidak boleh dianggap sebagai mengambil pandangan yang memesong (lihat ms 527E–I, 528B–C).]

Notes

For cases on discretion of the Minister, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1056–1059.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (refd)

Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155 (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374 (refd)

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305 (refd)

Minister of Labour, Malaysia v Chan Meng Yuen and another appeal [1992] 2 MLJ 337 (refd)

Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9 (refd)

Minister of Labour, Malaysia v National Union of Journalists, Malaysia and another appeal [1991] 1 MLJ 24 (refd)

National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower [1980] 2 MLJ 189 (refd)

Padfield & Ors v Minister of Agriculture, Fisheries & Food & Ors [1968] AC 997 (refd)

R v Secretary of State for Trade and Industry, ex p Lonrho plc [1989] 1 WLR 525 (refd)

Reg v Entry Clearance Officer, Bombay, ex p Amin [1983] 2 AC 818 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 2, 20(1), (1A), (2), (3)

S Shanker (*P Kuppusamy & Co*) for the applicant.
Azizah bte Hj Nawawi (*Senior Federal Counsel*) for the first respondent.
Mohd Nadzim (*Shahrizat & Tan*) for the second respondent.

KC Vohrah J: When a workman (irrespective of whether he is a member of a trade union of workmen or otherwise) considers that he has been dismissed without just cause or excuse by his employer he may make representations in writing to the Director General of Industrial Relations to be reinstated in his former employment. This is provided under s 20(1) of the Industrial Relations Act 1967 ('the Act').

In this instant case the applicant, Booi Kim Lee, who was Chief Security Officer, Golden Plus Granite Sdn Bhd ('the company'), was dismissed by the company, the said respondent, and he made representation in writing to the Director General within the time stipulated under s 20(1A).

As required under s 20(2), the Director General conducted conciliation proceeding. There being no likelihood of the representations being settled he notified the Minister accordingly under the same provision of the Act.

A Under s 20(3), upon 'receiving the notification ..., the Minister may, if he thinks fit, refer the representations to the Industrial Court for an award'. The word 'award' under s 2 means 'an award made by the Industrial Court in respect of any trade dispute or matter referred to it or any decision or order made by it under the Act'.

B The Minister declined to refer the representations to the Industrial Court for an award. A letter dated 28 October 1996 to that effect was sent to Booi.

In applying for an order of certiorari to quash the decision of the Minister and for an order of mandamus to require the Minister to refer the matter of Booi's dismissal to the Industrial Court Booi complains that the C Minister wrongly exercised his discretion. The complainant gives four grounds:

(a) Parliament conferred discretion to the Minister with the intention that it should be used to promote the policy and objects of the Industrial Relations Act 1967, but the Minister had, by reason of having D misconstrued the Act, or for some other reason, exercised his discretion in a manner which runs contrary to the policy and objects of the Act. The Minister had thus exceeded his jurisdiction and had acted ultra vires.

(b) In reaching his decision that was unfavourable to the applicant the E Minister had not directed himself properly in law as determined by the Federal Court in *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129, and had in consequence excluded from his consideration matters which he ought to have considered and had taken into consideration matters that ought not to have been considered. The Minister had therefore not asked himself the right questions.

F (c) The Minister had breached the principle of procedural fairness in not giving any reasons for his decision to refer the matter to the Industrial Court.

(d) The Minister had acted unreasonably in exercising his discretion not to refer the applicant's representations to the Industrial Court for an G award.

Judicial Review is not an appeal

Before I deal with the issue whether the discretion was rightly exercised it is necessary to be reminded of a few principles relating to the role of the High H Court in dealing with matters relating to the exercise of discretion by a public body. One of the foremost principles is this — the court does not act as an appeal court in such matters. This is clear from the decision of the Supreme Court in *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 at p 11 relying on Lord Greene's observation in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, that the I power of the court to interfere in each case is 'not as an appellate authority to override a decision of the local authority, but as a judicial authority to see whether the local authority have contravened the law ...'. In other words,

the High Court should not act as a court hearing appeals from subordinate courts. A

In *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at p 1174 Lord Brightman said:

> ... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. B

Lord Brightman in the *Evans* case stressed that judicial review is concerned, not with the decision, but with the decision making process observing that unless that restriction on the power of the court is observed, the court will under the guise of preventing the abuse of power, be itself guilty of usurping power. C

In *Reg v Entry Clearance Officer, Bombay, ex p Amin* [1983] 2 AC 818 at p 829, Lord Fraser of Tullybelton at para A observed that:

> ... Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made ... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer. D

At home the words of Raja Azlan Shah CJ (as His Highness then was) uttered in 1980 in the Federal Court case of *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189, are redolent of the same principle and philosophy at p 190 (right column paras E–F): E

> ... This subjective formulation is sufficient in our opinion to show that the Minister has a discretion to determine the desirability or otherwise of a particular course of action within the scope of the discretionary power. The exercise of this discretion is vested in the Minister, not in the courts. When this discretion is challenged, the courts must be vigilant and resist any temptation to convert the jurisdiction of the court to review, into a reconsideration on the merits as if it is an appeal. F

More recently in 1997, the Court of Appeal in *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305 at p 309 has reminded us of and reiterated the same principle and philosophy in the following words of Shaik Daud JCA: G

> First and foremost, it must be emphasized that in an application for certiorari, the High court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not the decision itself. The court should not readily question the administrative decision of the first respondent as that is his absolute discretion. If the first respondent had acted ultra vires, unfairly or unjustly in exercising his discretion, then it is the duty of the courts to interfere in an application for review of that decision. The underlying principles of judicial review have been stated in a number of cases, and it is the exercise by those with whom discretionary power is vested, not in the courts, that the courts are required to review. H I

Intervention on exercise of executive discretion on show that law contravened

The next principle we have to remind ourselves of is this — that the court can only interfere with an act of executive discretion if it be shown that the executive authority has contravened the law: see *Lie Seng Fatt* at p 11. Clearly this is a reference to the duty of the court to confine itself to the issue of illegality. This is presently still in an amorphous state and covers a host of related issues most of which are yet in the crystalline state being made subject to judicial control. Reference will be made to the observation of Lord Diplock on these matters on the House of Lords case of *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374 ('the *CCSU* case') when dismissing the next point that our Supreme Court in *Lie Seng Fatt* adverted to in its guideline on the functions of the court before interfering in the exercise of executive discretion.

Exercise of discretion governed by certain principles

The Supreme Court in *Lie Seng Fatt* stated that the exercise of discretion by an executive authority is governed by certain principles and so long as the exercise is within the four corners of these principles, the discretion is absolute and cannot be questioned in a court of law. The Supreme Court referred generally to these principles as enunciated by Lord Greene MR in the *Wednesbury Corp* case.

After the landmark case of *Wednesbury* in 1948 there has been starting from 1950 an accretion of judicial decisions of the English House of Lords and the Court of Appeal making radical changes in the scope of judicial review (see the observation of Lord Roskill at p 414 of the *CCSU* case) refining the principles that were enunciated and adding to or departing from the corpus of cases involving judicial review. The grounds for judicial review, while they sometimes overlap and may at times appear contradictory, are refreshingly forward looking and fair to the aggrieved party who seeks review and to the decision maker as the courts seek to do justice to both parties.

Lord Diplock in the *CCSU* case at p 410 classified the grounds subject to control by judicial review under three heads:

> ..., one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call '*illegality*', the second '*irrationality*' and the third '*procedural impropriety*'. That is not to say that further development on a case by case basis may not in course of time add further grounds. (Emphasis added.)

Lord Roskill at p 414 agreed with the classification and nomenclature.

It is useful to set out the classification and the observation of these two judges and other comments for a clearer perspective of the principles.

(1) Illegality

> By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power

> and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. (per Lord Diplock at p 410)

Put in other words '... the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess' (per Lord Roskill at p 414).

In this category will be the ultra vires doctrine illustrated by the locus classicus *Padfield & Ors v Minister of Agriculture, Fisheries & Food & Ors* [1968] AC 997 where the Minister's refusal to refer a complaint to a Committee of Investigation was held to be unlawful as being contrary to the policy and objects of the relevant statute.

Also in the category of illegality is the irrelevancy principle which was explained by Lord Greene MR in the *Wednesbury* case in the following terms at pp 233–234:

> ... The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account.

(2) Irrationality

> By 'irrationality', I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it (per Lord Diplock on at p 410).

Lord Roskill had this to say at p 414. '... where [the authority] exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers's shorthand, *Wednesbury* principles ...'.

There are other principles under the umbrella of the 'irrationality' principle and sharing also that offered by the 'illegality' principle like, inter alia, discretion must not be fettered, decision making must not delegated be unless authorised by proper authority but they are not discussed here as they are not relevant.

(3) Procedural Impropriety

> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice (per Lord Diplock at p 411).

Lord Roskill at pp 414–415 had this to say on procedural impropriety:

> ... The third is where it has acted contrary to what are often called 'principles of natural justice'. As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfillment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.

Under this heading is the issue whether the public law decision maker is under a duty to give reasons for the decision and this issue has been raised in the instant case and it will be discussed later.

In regard to the application, it will be noticed that ground (a) falls under the illegality heading; that ground (b) too falls under the illegality heading within the sub-heading of irrationality and that ground (c) is related under the heading of Procedural Impropriety. Ground (d) can be drawn under the heading irrationality but I note that the submissions have not touched on ground (d) and treat that as abandoned.

The facts

In his affidavit, Booi had this story to tell. He was employed by the company as its Chief Security Officer since 1990. On 8 April 1995 at about 9.30am, he saw one Zakaria bin Jaffar at a security post situated at the entrance to the company quarry. Zakaria had previously been employed by the company and had his service terminated two days earlier when he was tested positive during a drug test. Booi directed a security guard, Ariff, to check why Zakaria was present at the post but that officer did not return from the post. He then approached the post and questioned Zakaria as to why he was in the premises. Zakaria replied that he was just passing the time. Booi then instructed him to move out from the premises.

Zakaria began to grumble and used foul language while walking to the motorcycle. When he reached the motorcycle Zakaria grabbed his helmet and hit Booi on the head.

A struggle ensued and Booi was hit five or six times on the head with the helmet. Booi then ran to his car and took out a rubber hose from the boot. On seeing that he was armed, Zakaria went out of the main entrance. 'In my anger and pain I kicked his motorcycle and shouted for him to return.'

The sequel to this incident is explained by Booi in para 13 of his affidavit. He said a few minutes later a patrol car came into the quarry with three policemen. A policeman asked him about the struggle. He states, 'At this point of time Encik Zakaria came back into the quarry. As I was still

angry and in pain I hit Encik Zakaria on his back with the rubber hose. We were both advised by the police to make a police report'. A

About a month later on 6 May 1995 the company made a written charge against Booi and Booi attended a Domestic Inquiry on 12 May 1995.

It is not disputed that a full written verbal record of the verbatim statements of Booi and other witnesses including Zakaria was complied and it included the police reports of both Booi and Zakaria. The record (see the affidavit of the Chairman of the Domestic Inquiry — encl 8, exh AKM-1) included the detailed findings of the Panel conducting the inquiry and the recommendation of the Panel for the dismissal of Booi. B C

The upshot was that on 20 May 1995, the company dismissed Booi from its employment.

As alluded earlier in my decision, Booi made representation to the Director-General of Industrial Relations that he had been dismissed without just cause or excuse. The matter could not be settled and the Director-General so notified the Minister. The Minister in exercise of his discretion under s 20(3) of the Act declined to refer the representations to the Industrial Court. D

The full grounds of Booi's challenge of the Minister's discretion was set out earlier in the judgment and for convenience the grounds that are being pursued are briefly recapitulated here: E

(a) Illegality (acting ultra vires) — the Minister had exceeded his jurisdiction and had acted ultra vires the Act.

(b) Illegality (irrationality) — the Minister had failed to ask right question and had taken into consideration matters that ought not to be considered. F

(c) Procedural Impropriety — the Minister had breached the principle of procedural fairness in not giving any reasons for his decision to refer the matter to the Industrial Court.

Booi complained that the Minister failed to take into consideration that he was only defending himself during the fighting as Zakaria had assaulted him and had continued to assault him with his helmet; that Zakaria had a personal grudge against him because he had informed the company of his suspicion concerning his dadah abuse, that the domestic inquiry was held only after the company received a letter from Zakaria with signatures from other security guards who were to be Zakaria's friends; that if at all he was involved in any misconduct, it was provoked by Zakaria who repeatedly assaulted him with his helmet; that Zakaria was, at the relevant time, a trespasser and it was within his authority to order him off the premises; that even if he was involved in any misconduct, the punishment of dismissal was unduly harsh under the circumstances and that it was open to the company to mete out a lighter punishment; that since there is a dispute of fact only the Industrial Court has the adjudicatory power to hear evidence and to decide whether his dismissal was with just cause or excuse. G H I

A The argument was that the Minister was under a duty to study the facts before him and to refer matters that are not vexatious nor frivolous to the Industrial Court.

The first ground of 'ultra vires' can be brought under 'illegality' heading.

B As I understand counsel appearing for Booi, his argument is that the Minister did not take into consideration the policy and objectives of the Act which, inter alia, is to let the Industrial Court settle disputes between employers and workmen. He developed his argument by stating that in not referring the representations to the Industrial Court the Minister had not taken into consideration that the representations are not frivolous and C vexatious. Counsel relies on *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481. Unfortunately while reliance is placed on the 'frivolous and vexatious' test very little attention has been paid to the antecedents for its formulation. In *Padfield v Minister of Agriculture, Fisheries & Food*, Lord Hodson in discussing ministerial discretion arising from the words 'if the Minister in any case so directs' in a D statute, whether an aggrieved party has an absolute right to an inquiry or that the Minister has unfettered discretion to refer any in any case, had this to say at p 1045–1046:

> The discretion must be exercised by the Minister in accordance with the intention of the Act but there is nothing in the language used in the subsection E introduced by the words 'if the Minister in any case so directs' nor in the context of the Act and earlier legislation to support the view that an absolute right to an enquiry is given to an aggrieved person. The argument of the appellants is undermined, in my opinion, by their concession that trivial, frivolous or vexatious complaints can be shut out as, for example, where a complaint has been recently dealt with in a parallel case.

F Thus, trivial, frivolous or vexatious complaints can be shut out. But trivial, frivolous or vexatious complaints are not the only grounds on which the Minister may refuse to refer the representations to the Industrial Court. Put it conversely if the complaint is neither trivial, nor frivolous nor vexatious the Minister may still refuse to refer the representations and as clarified by G Hashim Yeop Sani CJ (Malaya) in *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 at p 12:

> ..., so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates H against the object of the statute.

It is in this context the 'frivolous or vexatious' test is dealt with. His Lordship continued that 'otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one'.

I It will be recollected that *Padfield*, *Lie Seng Fatt* and *Minister of Labour, Malaysia v National Union of Journalists, Malaysia and another appeal* [1991] 1 MLJ 24 were considered by Gopal Sri Ram JCA in *Hong Leong* and the

underlying principle is that the Minister should take into consideration all relevant factors and disregard all irrelevant factors when deciding whether to refer the representations to the Industrial Court bearing in mind what was stated by Hashim Yeop A Sani in *Lie Seng Fatt* earlier adverted to in relation to the exercise of discretion.

It is in that context that the court should examine the facts that were made available to the Minister before he made his decision either to refer or not to refer the representations to the Industrial Court. If the representations are clearly trivial, frivolous or vexatious then the refusal of the Minister to refer the representations to the Industrial Court cannot be interfered with by the High Court. If the representations are not clearly trivial, frivolous or vexatious then as was alluded to earlier, the High Court has to examine whether the Minister has exercised his discretion with improper motive, or that he misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or given a decision that militates against the object of the statute.

Thus, coming back to the argument of counsel for Booi, whilst the examination of the facts by this court shows that it is true that the representations are not trivial, frivolous or vexatious, that does not mean that the inquiry ends there. This court has to further inquire into the matters on the lines set out in the last four paragraphs.

As to the ground that the Minister failed to take into account the policy and objectives of the Act this will be considered when this court further examines the information that had been place before the Minister.

In para 9 of his affidavit the Minister has stated he had taken into consideration all the relevant information relating to the representation and information relating to the conciliation proceedings and that he exercised his discretion fairly and honestly when he declined to refer the representation to the Industrial Court. He stated that his decision was based on information given by the DG, the applicant and the company. The company provided at the conciliation proceedings the report of the Domestic Inquiry and the notes of proceedings (encl AKM-1) which included a verbatim report of the questions asked of and the answers given by Booi and other witnesses at the proceedings.

It has not been shown that the facts point to the Minister acting outside the provision of the Act and that they raise serious questions of facts or law. There was indeed engagement in a physical fight between Booi and Zakaria as found in the enquiry (BKL6). There is really no dispute as to certain relevant facts and these were before the Minister that when Zakaria broke away from the fight the fight should have ended. Instead, Booi invited Zakaria to another bout of fight by violently kicking Zakaria's motor cycle and inviting him 'to come to me with a view that I may be able to hit him back' and then in the presence of police officer beat Zakaria with a hose. Booi was the Chief Security Officer of the company. The Panel sitting in the inquiry found the charge proved and the finding is as follows:

> At approximately 0935 on 8 April 1995, you were found engaged in physical fighting with Encik Zakaria within the company premises; an act, conduct or

A behaviour which is unbecoming of the expected standard of conduct and behaviour of an executive of the company in your position as Chief Security Officer.

The finding was on the basis of evidence of witnesses and the admission of culpability by Booi to his attacking Zakaria with the rubber hose at a later B stage of the quarrel.

The dispute of facts is not on fundamental issues and in any event there is no legal requirement that merely because representations are made they must automatically be referred to the Industrial Court (see *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305). I C do not see the Minister exercising his discretion with improper motive. Ground (a) also to be considered with ground (b), which is that the Minister had failed to ask the right questions and had taken into consideration matters that ought not to be considered. Ground (b) can still be considered under the illegality heading within the sub-heading of irrationality. It has not been shown what right questions were not asked. I D know this might be tied up with the fact that the Minister has not given reasons for his decision so there is no way, so to speak, it may be argued, to pin-point where he had erroneously considered or what he should have considered. As regards the failure to give reasons that ground can be brought under the heading of procedural impropriety.

E Now there is no duty expressed under the Act or the Rules made thereunder for the Minister to provide reasons for the course of action that he took. The Supreme Court in *Minister of Labour, Malaysia v National Union of Journalists Malaysia & another appeal* [1991] 1 MLJ 24 has ruled that the Minister of Labour is not required to give reasons when he exercises his discretion under s 20(3) of the Industrial Relations Act 1967 and this F has been reiterated by the same court in *Minister of Labour, Malaysia v Chan Meng Yuen and another appeal* [1992] 2 MLJ 337. I am aware of *Hong Leong* where the Court of Appeal considered both Supreme Court cases and expressed a contrary view to the effect that reasons should be given by the Minister. I understand that view will be challenged in the Federal Court. Be that as it may, as I read and understand the judgments of both Gopal Sri G Ram and Siti Norma Yaakob JJCA, it is not an inexorable principle; it would appear it is permissible, nevertheless, to go into the merits of the case as the learned Court of Appeal judges did, depending on the facts and circumstances of the case, to see if the discretion was properly exercised. In our case the Minister in his affidavit did not give the reasoning for his H decision not to refer the representations to the Industrial Court save to state that he had all matters that were relevant before him, information by Booi, by the employer and particularly all matters relating to the conciliation proceedings. And surely, in this context, the admission of culpability by Booi, the Chief Security Officer, in inviting Zakaria to come over after kicking his motor cycle so that 'he may come to me with a view I may hit I him back' and that he then beat Zakaria with a hose in full view and in contempt of the police cannot be ignored by any person similarly circumstanced to make a decision.

It was submitted by Booi that '(the) only reason the company (ie the employer) relied on in dismissing Booi was that he hit Zakaria with the rubber hose' and that there were instigating circumstances for his actions but this is to fail to take into account the findings of the Panel which are contained in the exh AKM-1, appended to the affidavit of Lt Kol (Bersara) Akhbar Khan bin Muhabat Khan (encl 8), the chairman of the Panel; the emphasis was on the fact that Booi was an executive of the company and that he was Chief Security Officer and that he could not control himself when he, on his own admission, hit Zakaria with a rubber hose in the presence of three policemen after a break from the previous physical engagement with Zakaria. The view was that the fighting incident brought to the surface Booi's poor management and abuse of power and showed that he was by nature an aggressive, arrogant, impatient and rude person. The issue of instigation or provocation is irrelevant in the context of his being a Chief Security Officer. I do not see how any reasonable person relying on facts and these circumstances to dismiss an employee can be considered as taking a perverse view. It is also argued that an important point for the Minister to have considered was whether there was in fact any misconduct committed by Booi at all. That obviously cannot be right. There was misconduct when he kicked Zakaria's motorcycle and when he hit Zakaria with a hose. As to whether his action repudiate the essential contractual term of service, his actions were not that of a mere employee but that of the Chief Security Officer of the company and these findings of the Panel earlier mentioned are relevant as to why he had to be dismissed. As I have observed earlier I do not see how relying on that for his dismissal can be considered perverse. Taking all the facts and circumstances as were disclosed to the Minister it has not been shown that the known facts and circumstances appear to point overwhelmingly in favour of a different decision. I bore in mind the words of Lord Keith of Kinkel in the House of Lords in *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525 at pp 539–540:

> The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision.

As for the issue of condonation because of the delay in the company taking action against the employee, the incident took place on 8 April 1995. Booi was charged on 6 May 1995, one month later. That is not undue delay.

In all the circumstances, I have to dismiss the application with costs.

Application dismissed.

Reported by Jafisah Jaafar